

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

YI YAN HONG

v.

TEMPLE UNIVERSITY

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CIVIL ACTION  
No. 99-6515

O'Neill, J.

March , 2000

**MEMORANDUM**

Presently before the Court is defendant Temple University's motion to dismiss all counts of the complaint. Plaintiff Yi Yan Hong, M.D. opposes the motion and requests leave to amend the complaint. The Court finds that plaintiff has failed to state a claim for discriminatory retaliation under federal law. Therefore, plaintiff's federal claims will be DISMISSED pursuant to Fed. R. Civ. P. 12(b)(6), the Court will decline consideration of plaintiff's state claim pursuant to 28 U.S.C. § 1367(c)(3), and plaintiff's request for leave to amend will be DENIED.

**BACKGROUND**

For the purposes of this motion, the Court assumes that the well-plead factual allegations in the complaint are true.

Dr. Hong became an Assistant Professor in the Department of Anesthesiology at Temple's School of Medicine in 1994. His appointment letter stated that he was being appointed for the period from June 1, 1994 to June 30, 1997. On February 28, 1997, he was notified that

his appointment would not be renewed and his employment would therefore terminate on June 30, 1997.

In July 1998, plaintiff filed his first action against Temple claiming that his termination constituted disability discrimination, race discrimination, and breach of contract. See Civil Action No. 98-4899 (E.D. Pa.). In November 1999, plaintiff sought leave to add retaliation claims in that action. The Court denied leave to amend because of plaintiff's undue delay in seeking leave to amend and the resulting prejudice to Temple. See Order dated December 20, 1999. The day after that Order was entered, plaintiff filed his retaliation claims in this separate action.

The First Amended Complaint in this action alleges that Dr. Hong filed a grievance with Temple's Medical Faculty Personnel Committee after his termination. The Committee later concluded that Dr. Hong was not given sufficient notice of his termination under the University bylaws and therefore made a non-binding recommendation that he be granted another year of employment.

On September 17, 1998, Peter J. Liacouras, the President of Temple, responded to the Committee's recommendation by way of a confidential memorandum. President Liacouras took the position that Dr. Hong was not covered by the one-year notice provision of the Faculty Handbook because of his status as a "Dean's appointment." In one of the concluding paragraphs of the memorandum, President Liacouras stated that: "Because of Dr. Hong's pending lawsuit and his decision to have the matter resolved in a legal forum, I regrettably must decline to make any determination other than that Paragraph III of the Faculty Handbook does not apply to him."

The First Amended Complaint claims that this statement constituted retaliation under

Title VII, the Americans with Disabilities Act, 42 U.S.C. §§ 1981 and 1983, and the Philadelphia Fair Practices Code.

## DISCUSSION

### A. Federal Claims

The gravamen of the federal claims is plaintiff's belief that President Liacouras' statement in the September 17, 1998 memorandum was retaliatory.<sup>1</sup>

In Robinson v. City of Pittsburgh, 120 F.3d 1286 (3d Cir. 1997), the Court of Appeals found that retaliatory conduct is proscribed by Title VII only if it "alters the employee's compensation, terms, conditions, or privileges of employment, deprives him or her of employment opportunities, or adversely affects his or her status as an employee." Id. at 1300, quoting 42 U.S.C. § 2000e-3(a). "It follows that not everything that makes an employee unhappy qualifies as retaliation, for otherwise, minor and even trivial employment actions that an irritable, chip-on-the-shoulder employee did not like would form the basis of a discrimination suit." Id., quoting Smart v. Ball State University, 89 F.3d 437, 441 (7th Cir. 1996). On this basis, the Court ruled that allegations of "unsubstantiated oral reprimands" and "unnecessary derogatory comments" did not rise to the level of actionable retaliatory conduct. Id. at 1301.

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<sup>1</sup> Plaintiff claims that the allegedly retaliatory conduct was a violation of Title VII, the ADA, and 42 U.S.C. §§ 1981 and 1983. Title VII and the ADA both contain specific provisions that prohibit retaliation. See 42 U.S.C. § 2000e-3(a) (Title VII's retaliation provision); 42 U.S.C. § 12203(a) (the ADA's retaliation provision). Courts apply the framework for Title VII retaliation claims in evaluating ADA retaliation claims. See Treglia v. Manlius, 68 F. Supp.2d 153, 159 (N.D.N.Y. 1999). Plaintiff has not provided the Court with any authority to show that retaliation claims are also cognizable under §§ 1981 and 1983. The Court assumes for the purposes of this decision that if such claims are cognizable, they may be analyzed consistent with Title VII.

Applying Robinson, it is clear that President Liacouras' statement is not actionable retaliation. The statement could not have altered the terms and conditions of Dr. Hong's employment or adversely affected his status as employee because he had already been terminated sometime before.<sup>2</sup> Nor could it have deprived Dr. Hong of future employment opportunities since it was a confidential memorandum that was never meant to be seen by other prospective employers. Cf. Robinson v. Shell Oil Co., 519 U.S. 337 (1997) (unfavorable reference by former employer can be the basis of a retaliation claim under Title VII). Moreover, when read in context the statement cannot reasonably be construed to be anything but benign. President Liacouras simply stated his basis for rejecting the Committee's non-binding recommendation and noted he could not say anything else about the matter because of pending litigation. He did not state or imply that he was rejecting the recommendation because of the pending litigation. The Court will not adopt a rule that would prevent employers from referring to the fact that a lawsuit has been brought against them for fear of being subject to a retaliation claim.

Accordingly, plaintiff's federal claims will be dismissed.

## B. State Claims

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<sup>2</sup> Of course, if President Liacouras had accepted the Committee's recommendation, it would have changed Dr. Hong's status as an employee. However, the First Amended Complaint pleads retaliation only based upon the statement itself, not upon President Liacouras' rejection of the Committee's recommendation. See First Amended Complaint ¶ 23. Plaintiff has requested leave to amend to make such a claim, but the Court rejects that request for the reasons stated below. See infra Section C.

Because the federal claims have been be dismissed, the Court will not consider plaintiff's state claims under the Philadelphia Fair Practices Code. See 28 U.S.C. § 1367(c)(3).

C. Leave to Amend

In his response to defendant's motion to dismiss, plaintiff requested leave to amend to cure the obvious defects in the First Amended Complaint. Plaintiff also attached a copy of the Second Amended Complaint that he intends to file if leave is granted. The Second Amended Complaint is substantially the same, but recharacterizes President Liacouras' memorandum as a discriminatory failure to rehire.

Rule 15 generally provides that leave to amend should be "freely given when justice so requires." See Fed. R. Civ. P. 15(a). Grounds that justify denying leave to amend include undue delay, bad faith, dilatory motive, prejudice, and futility. See In re Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1434 (3d Cir. 1997). When plaintiff sought leave to amend his complaint to add retaliation claims in his first suit against Temple, the Court denied that motion because of undue delay and prejudice. See Civil Action No. 98-4899, Order dated December 20, 1999. Since that time, months have passed and plaintiff has had two additional opportunities to plead these claims (i.e., the Complaint and First Amended Complaint in this action). In addition, though the contents of the confidential memorandum were not known to plaintiff until discovery in his first suit against Temple, the fact that President Liacouras did not accept the Committee's recommendation was obviously known to plaintiff since before he filed the first suit. The proposed amendment is therefore even more unduly delayed and prejudicial than the other options the Court has already rejected. Finally, it is likely the proposed amendment would be

futile. President Liacouras' memorandum was merely a confidential explanation of the University's actions that was made in response to a non-binding recommendation. It cannot fairly be characterized as a refusal to rehire.

For these reasons, leave to amend will be denied.

An appropriate Order follows.

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**ORDER**

AND NOW, this            day of March, 2000, in consideration of defendant's motion to dismiss, and plaintiff's response thereto, and for the reasons set forth in the accompanying memorandum, it is hereby ORDERED that the complaint is DISMISSED and plaintiff's request for leave to amend is DENIED.

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THOMAS N. O'NEILL, JR., J.